No. 16999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

[illegible] THOMAS BURR,

Appellant,

vs.

[illegible] Officer in Charge of the U. S. Immigration & Naturalization Service,

Appellee.

APPELLANT'S OPENING BRIEF.

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DONALD THOMAS BURR,

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Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

Appellant Donald Thomas Burr, while detained by the United States Immigration and Naturalization Service of the Southern District of California, filed a petition for a writ of habeas corpus in the United States District Court for that district. The District Court had jurisdiction to entertain the petition under the provision of United States Code, Title 28, Section 2241. Jurisdiction to review the final order of the District Court is conferred upon this Honorable Court by United States Code, Title 28, Section 2253.

Statement of the Case.

Appellant, Donald Thomas Burr, is an alien w entered the United States on October 8, 1946. [. of Rec. p. 3.] On February 2, 1951, Appellant com itted the offense of issuing a check without sufficient nds, a crime involving moral turpitude. [Tr. of Rec. p. 4, 5.] He pleaded guilty to this offense in the Superior Court of the State of California, in and for the County of Los Angeles and, on May 9, 1951, was grante probation for a period of ten years on condition, nong others, that he serve ten months of his probat nary period in jail, for which purpose he was rem nded. [Tr. of Rec. p. 4.] Some eight years later, or May 15, 1959, appellant's probation was revoked. H was thereupon sentenced to serve one year in the Lo Angeles County Jail, less deductions to which he w s entitled under the applicable California law. [Tr. o Rec. p. 4; Calif. Penal Code, Secs. 4019, 4019.2.] ppellant was remanded to the custody of the Sher f of Los Angeles County to serve this sentence. [r. of Rec. p. 4.] Thereafter, appellant was detained the United States Immigration and Naturalization Service, was ordered deported, and filed his petition or a writ of habeas corpus. [Tr. of Rec. pp. 3, 4. On March 21, 1960, approximately ten months an one week after sentence was imposed upon him in th Los Angeles Superior Court, appellant was produced n the United States District Court by the Immigratio and Naturalization Service in response to the order f the District Court. [Tr. of Rec. pp. 3-5.] On M 27, 1960, the District Court made its order dischargi g the writ of habeas corpus. [Tr. of Rec. p. 5.] ppellant filed timely notice of appeal from this rder. [Tr. of Rec. p. 6.]

he single question presented is whether, on the facts as found by the District Court, appellant has been sentenced to confinement for a year. If he has, then he may be deported pursuant to the provisions of United States Code Title 8, Section 1251(a)(4). If he has not, he is not so deportable, and the writ of habeas corpus should have been granted. Appellant contended in the District Court, and contends here, that the sentence imposed upon him was not a one year sentence, and that he is therefore entitled to his release.

Specification of Errors Relied Upon.

. The District Court erred in concluding from the facts found that appellant had been sentenced to confinement for a year. [Tr. of Rec. p. 5, Concl. of Law IV]

. The District Court erred in concluding from the facts found that appellant is a deportable alien as classified in Title 8, United States Code, Section 1251. [Tr. of Rec. p. 5, Concl. of Law V.]

Summary of Argument.

Appellant contends that the sentence imposed upon him by the California Superior Court on May 15, 1959, was not a sentence to confinement for a year within the meaning of United States Code, Title 8, Section 1251(a)(4). California Penal Code Sections 4019 and 4 9.2 provide for deductions from a period of confinement for the good conduct of and work performed by a prisoner. By virtue of these statutes appellant could, and did, complete his sentence, satisfy the judgment of the court, and obtain his full and unconditional release, in less than one year. Therefore, the sentence was to confinement for less than one year.

Argument.

Title 8 United States Code Section 1251, so r as it is involved in the case at bar, provides as follo s:

> "(a) Any alien in the United States (inc ding an alien crewman) shall, upon the order the Attorney General, be deported who . . .
>
> * * *
>
> (4) Is convicted of a crime involving mor tur- pitude committed within five years after ntry and either sentenced to confinement or co fined therefor in a prison or corrective institutio , for a year or more, . . ."

On May 15, 1959, appellant was sentenced to serve one year in the county jail of the County of Lo An- geles. [Tr. of Rec. p. 4.] At the time sentenc was imposed upon appellant, and since that time, Cal ornia Penal Code Sections 4019 and 4019.2 provided:

> 4019. "For each month in which a pisoner confined in a county jail, industrial farm o road camp or any city jail, industrial farm or roa camp under a judgment of imprisonment, or a fi and imprisonment until the fine is paid, or in wich a prisoner confined in the county jail, industria farm or road camp as a condition of probation after suspension of imposition of a sentence or spen- sion of execution of sentence, in a crimi l ac- tion or proceeding, appears, by the record, t have given a cheerful and willing obedience to th rea- sonable rules and regulations established the county board of parole commissioners for th con- duct of such prisoners, and that his conduct is re- ported by the officer in charge of the jail, ndus-

trial farm or road camp to be positively good, five days shall, with the consent of the county board of parole commissioners, be deducted from his period of confinement."

4019.2 "For each month in which a prisoner confined in or committed to a county jail, industrial farm or road camp, including a prisoner confined therein pursuant to a judgment of fine and imprisonment until the fine is paid, has satisfactorily performed his assigned work, as reported and recorded by the officer in charge, five days shall, with the consent of the board of supervisors or the county board of parole commissioners, be deducted from his period of confinement. The deduction allowed pursuant to this section shall be granted regardless of whether or not a deduction is made pursuant to Sections 4018 and 4019, but no prisoner shall be granted a total deduction under these sections in excess of 10 days for any single month."

t does not appear from the record in the instant p ceeding exactly when appellant was released from c tody by the Sheriff of Los Angeles County. How- e r, it does appear that on March 21, 1960, which was l s than one year after sentence was imposed, appel- l t was in the custody of the Immigration Service a l was produced in the United States District Court. T ereafter, still within one year, he was released by t t court on bail. [Tr. of Rec. p. 3.]

Appellant contends that California Penal Code Sec- t ns 4019 and 4019.2 formed a part of the sentence i posed upon him, that by virtue of them he could,

and did, fully serve and satisfy the sentence imposed upon him in less than one year, and that, therefore, the sentence imposed was for a term of less than one year within the meaning of Title 8 United States Code, Section 1251. The question thus raised appears never to have been decided in any reported case. More or less analogous questions have arisen in other circuits, but none of these cases appears to have resolved the question here presented. Therefore, this Honorable Court has the duty of formulating a proper construction of Section 1251 as it applies to the situation here presented and in conformity with the rule that any doubt as to the proper interpretation of a deportation provision of the Immigration and Nationality Act must be resolved in favor of the alien. *(Wood v. Hy* (9 Cir., 1959), 266 F. 2d 825.)

The cases do not create a very clear picture as to the legal principles to be applied in resolving the question presented in the case at bar. We shall set out those which appear pertinent in more or less chronological order without regard to whether we consider them favorable to appellant's position. We shall then discuss our view as to the effect which should be given to them.

In *United States ex rel. Paladino v. Commissioner* (2 Cir., 1930), 43 F. 2d 821, the court held that an indeterminate sentence to a maximum of three years under the New York law was a sentence for one year or more under the immigration law. The court pointed out that a prisoner released under the applicable New York law remained subject to the supervision of the parole commission, which was given the power to retake and reimprison a parole violator to serve the remainder of his term. (P. 822.)

In *United States ex rel. Cerami v. Uhl* (2 Cir., 1935), 78 F. 2d 698, the alien, under applicable New York law, was at the age of seventeen made a ward during his minority of the New York House of Refuge, whether or not discharged or paroled therefrom. The court held that commitment was for more than one year under the rule of the *Paladino* case, *supra*, but that it was not a sentence within the meaning of the immigration law.

United States ex rel. Popoff v. Reimer (2 Cir., 1935), 79 F. 2d 513, held that an indeterminate sentence to the New York Reformatory was a sentence to imprisonment for more than one year within the meaning of the immigration law, distinguishing *Uhl, supra*, on the nature of the confinement, and following *Paladino, supra*, as to the length of the sentence.

King v. United States (C. of A. for D. C. 1938), 68 App. D. C. 10, 98 F. 2d 291, involved the question whether, when a void sentence had been imposed and set aside, the valid new sentence could be harsher than the old. This issue related in part to the amount of "good-time" allowances which could be earned under the respective sentences. The court followed *Paladino, supra*, and other cases, in stating that indeterminate sentences are sentences for the maximum term for which the defendant might be imprisoned, but went on to distinguish them in the following language (98 F. 2d 293):

"This is because earlier freedom on parole is neither absolute nor, under the Federal Statutes, a matter of right. (Citation) But a good conduct or 'good-time' allowance, when earned, is a matter of right. (Citation.) Unless it appears that a

> prisoner's conduct has forfeited good-time allowances, they must be deducted before the comparative severity of sentences can be determined
>
> * * *
>
> "If two sentences are of equal nominal length, but the first involves more 'good-time' liberty while the second involves more actual imprisonment, clearly the second is the more severe."

Story v. Rives (C. of A. for D. C. 1938), 68 App. D. C. 325, 97 F. 2d 182, relied upon in the *Kin* case, *supra*, holds that a release following allowance of good-time credits as provided by statute cannot be denied, but that when a prisoner is released he must under applicable Federal Statutes, be "treated as if released on parole."

In the matter of J....., Board of Immigration Appeals 1955, approved by Attorney General 195, 6 I. and N. 562, the alien had originally been sentenced by a Nevada court to an indeterminate sentence of 1 to 10 years. Subsequently his sentence was "commuted" by the Nevada Board of Pardons and Paroles to ten calendar months. The Board of Immigration Appeals held that commutation of the sentence substituted the new sentence for the old, and that the new sentence was for less than one year. The Board spoke in part as follows: (6 I. and N. 566)

> "The situation with respect to a commutation of sentence is, of course, readily distinguishable from that which exists where a convict is paroled. One who has been paroled, although permitted to go outside the prison walls, remains in legal theory in the custody and control of the war-

den of the prison until the completion of the maximum term. The respondent's maximum sentence was ten years but the record shows clearly that he had no further obligation to the State of Nevada when he was released at the end of ten months. For that reason, it is also apparent that the commuted sentence was not one of ten months to ten years."

In *Petsche v. Climgan* (10 Cir. 1960), 273 F. 2d 83, the alien had been sentenced to the Colorado State Reformatory until discharged by law. The maximum possible term was 10 years. The alien served 7 months and 5 days. The court held that, when the maximum imprisonment possible for the offense is more than one year, an indeterminate sentence is for a year or more, relying upon the three Second Circuit cases cited above. The *Petsche* case is distinguishable from the Second Circuit cases in that, under the Colorado law, Petsche's release from the reformatory was absolute, while as appears from those cases, the New York law provided for a conditional release under which the prisoner could be retaken and imprisoned for violation of parole. (Colorado Revised Statutes, Sec. 105-3-3.) The absolute character of Petsche's release does not appear from the opinion of the Court of Appeals, and the opinion did not discuss the rationale of the Second Circuit cases. Thus, *Petsche v. Climgan, supra,* represents a considerable extension of the Second Circuit rule, which appears not to have been recognized or considered by the Court.

We submit that the foregoing cases do not lay down any clear standard to be applied in determining whether

appellant in the case at bar is deportable. They do provide several grounds for concluding that he is not deportable. On the other hand, to find appellant deportable on the basis of these cases would require a still further extension of the holding in *Petsch v. Climgan, supra,* a case which has already extended the rule beyond the reasoning which supports it.

One ground for concluding that appellant's sentence was for less than one year may be established by a Euclidean style of reasoning from one of the holdings in *King v. United States* (C. of A. for D. C. 1938), 69 App. D. C. 10, 98 F. 2d 291, *supra.* As we have seen, that case held that, if two sentences are of equal length, but one involves more good time than the other, the one involving the least good time is the more severe. A one year sentence which allows no credit for good time is a one year sentence within the meaning of Title 8 United States Code, Section 1251. A one year sentence which allows good time credit is, under the holding of the *King* case, less severe than the one year sentence which does not allow such credit. While the harshness of two sentences may differ in respects other than duration, the difference between the allowance or non-allowance of good time credit obviously is one which relates to the duration of the sentence. A sentence less severe with respect to duration is a shorter sentence. Therefore a one year sentence which allows good time credit is shorter than a one year sentence which does not. Therefore a one year sentence less good time credit is a sentence of less than one year. Q. E. D.

The conclusion that appellant's sentence was for less than one year also finds support in the holding of

Story v. Rives (C. of A. for D. C. 1938), 68 App. D.C. 325, 97 F. 2d 182, *supra,* and *King v. United States* (C. of A. for D. C. 1938), 69 App. D. C. 10, 98 F. 2d 291, *supra,* that good time credit allowed by statute, when earned, is a matter of right. In the case at bar the statutes allowing credits for good conduct and work were on the books at the time sentence was imposed. The judge who pronounced the sentence and the defendant were presumed to know about them. Thus, they were part of the sentence. Under the holdings of the *King* and *Story* cases, *supra,* these statutes conferred rights upon the defendant. Thus, if he fulfilled the conditions referred to in the statutes, the authorities were duty bound to allow him the credits provided for in the statutes. Thus, appellant had it within his power to assure that his sentence would be fully completed and satisfied within a period of less than a year. In this respect the situation differed from parole in two vital ways. Firstly, the discretion was his own, not that of someone else. There was no question of changing his sentence or of somebody exercising discretion as to whether he should be released at some future time. Under the terms of his sentence he had an absolute right to release in less than a year if he performed an act or series of acts which it was within his own unlimited power to perform.

Another way in which appellant's situation differed from a provision for parole is that his release upon completion of the sentence of a year, less good time and work credits, was absolute. We find no California statute analogous to the Federal provision requiring that appellant be treated as on parole. His position after release was analogous to that of the alien in the

matter of J....., 6 I. of N. 562, *supra,* ther than to that of the aliens in the Second Circuit ases. Thus, under the sentence imposed upon appella, he had a right to his absolute release in less than one ear. His sentence was therefore one for less than one ear.

It is appellant's contention that either of the ore-going lines of reasoning would justify the conc sion that his sentence was one for less than one year ithin the meaning of the statute. It should be note that both of these lines of reasoning are consistent w a all of the cases cited above. There appears to be n law to the contrary. Therefore, under the rule req ring that any doubt as to interpretation of depor ation statutes should be resolved in favor of the alie, we submit that the reasoning should be adopted.

As we have just said, we believe that the c e at bar can properly be decided in favor of the alien upon a relatively narrow ground consistent with all the foregoing cases. However, we also believe th, in the interest of justice and of carrying out the ntent of the Congress, this Honorable Court should eject the holding in *Petsche v. Climgan,* 278 F. 2d 683, *supra,* and interpret the statute in a manner consistent with all the other cases, which gives effect to t intent of Congress, and which is both just and wo able. We respectfully submit that this Honorable Court should hold that a sentence is for less than one year within the meaning of Title 8 United States Cod Section 1251 if, under its terms, it can be, and it is fully carried out and satisfied within one year.

A rule such as we have suggested is consisten with all of the cited cases except *Petsche v. Climgan, upra.*

It conforms to the three Second Circuit cases, because th all involved persons who remained on parole or nder wardship for more than a year. It is consistent wi the distinction drawn in the *King* case, *supra,* be- wen good time and parole.

Adoption of the interpretation suggested would also eliminate an anomaly created by the decision of the Matter of J....., 6 I. and N. 562, *supra.* Under th holding in that matter, the alien was not deporta- bl although he had received a one to ten year sentence, because the original sentence ceased to exist as a result of the commutation to ten months. However, the rea- soning suggests that he would have been deportable if th original sentence had been ten months to ten years an he had merely been released after ten months. Such a distinction is logical, but, we submit, absurd. It would be eliminated by adopting the suggested rule.

The interpretation suggested would be simple and workable. The first test to be applied would be whether th alien was actually released within a year. If he was, the applicable law would be examined to deter- mine whether that release was absolute upon a full sat- isfaction of the sentence. If it was, the alien would no be deportable. If it was not and he remained for more than one year under some sort of continuing con- trol which was part of the sentence, he would be de- portable. Such an interpretation seems simple and readily applicable to the myriad of different types of sentencing procedure in the various states.

The suggested interpretation carries out the intent of Congress far better than the rule laid down in *Petsche v. Climgan,* 273 F. 2d 683, *supra.* It is evident that

the purpose of Congress in enacting the provisi n of Section 1251(a(4) relating to sentence and co inement was to require deportation only in those ases where an alien had committed a violation of law which was relatively serious in nature. It is f ther clear from the fact that Congress provided th the distinction should be made upon the basis of the sentence or confinement actually imposed, rather tha that which could have been imposed, that Congres was concerned not with the gravity of the offense de- fined by law, but with the gravity of the part ular violation actually perpetrated by the alien. In rder to avoid the necessity for retrying each case, Co ress sensibly assumed that the trial judge would weig the gravity of the particular offense of the alien wh n he imposed sentence and that the gravity would the fore be measured by the sentence. This reasoning, how- ever, did not take account of the possibility that some of the states would remove from the hands of th trial judge the function of determining what sentence ould be imposed. Yet this is what has happened in many states. The result is that the application of a rul such as that laid down in *Petsche v. Climgan, supra,* akes a mockery of the intent of Congress. The trial udge who sentenced Petsche probably knew perfectly well when he did so that Petsche would serve about even months. That is no doubt why he sent him to te re- formatory instead of the penitentiary. Yet, und the Colorado law, if the judge was to send Petsche the reformatory for seven months, he had to impose what the Court of Appeals for the Tenth Circuit has uled was a ten year sentence. Thus, under the rle of *Petsche v. Climgan, supra,* Petsche's deportabilit was

measured, not by what the trial judge thought about the gravity of Petsche's offense, as Congress intended, but by what the Colorado Legislature considered to be the longest possible time that the keeping of a reformatory inmate might ever be justified. We think that had the court fully considered this aspect of the matter, it would have reached a different result.

For the foregoing reasons appellant respectfully submits that United States Code, Title 8, Section 1251(a)(4), should be interpreted to mean that, whenever a court imposes a sentence which can be fully satisfied within one year, and it is so satisfied, then the sentence was for less than one year within the meaning of the section. Under such an interpretation, as well as under the reasoning previously set forth relating more specifically to the matter of good time credits, appellant's was a sentence to confinement for less than one year. Therefore, he does not come within the class of persons described in Title 8 United States Code, Section 1251(a)(4), he is not deportable, and he should have been discharged on habeas corpus.

Conclusion.

For the foregoing reasons appellant respectfully submits that the judgment of the District Court should be reversed and appellant should be discharged from the custody of the Immigration and Naturalization Service.

Respectfully submitted,

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